

2-1-1978

# Commercial Law -- Anticipatory Repudiation: A New Measure of Buyers' Damages Under the Uniform Commercial Code

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## Recommended Citation

Carlyn G. Poole, *Commercial Law -- Anticipatory Repudiation: A New Measure of Buyers' Damages Under the Uniform Commercial Code*, 56 N.C. L. REV. 370 (1978).

Available at: <http://scholarship.law.unc.edu/nclr/vol56/iss2/10>

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comment to the pre-1972 amendments stance of the Civil Rights Act requiring equality of treatment. Thus, an employer no longer has to make a showing of *undue* hardship; it need only show that accommodation will require greater than de minimis costs or "unequal" treatment of employees. In so circumscribing the requirement, the Court nearly proclaims the amendment a nullity.

ELIZABETH L. MOORE

## Commercial Law—Anticipatory Repudiation: A New Measure of Buyers' Damages Under the Uniform Commercial Code

Measuring an aggrieved buyer's damages when a seller wrongfully repudiates a contract before performance is due has long been considered a troubling and complex task.<sup>1</sup> The complexity concerns, first, the time from which damages should be measured if the buyer chooses not to purchase substitute goods (cover) and, second, the application of the Uniform Commercial Code's concept of cover in determining this time.<sup>2</sup> Section 2-713 of the Code, which sets forth the buyer's damages for nondelivery, states that damages should be measured by calculating the difference between contract price and market price at the time the buyer "learned of the breach."<sup>3</sup> Section 2-610, however, indicates that if a seller repudiates before performance is due, an aggrieved buyer may await performance for a "commercially reasonable time" before taking any action.<sup>4</sup> Damages can be calculated

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1. See, e.g., R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 149 (1970); J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 6-4 (1972).

2. U.C.C. § 2-712 provides:

"Cover"; Buyer's Procurement of Substitute Goods

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

3. U.C.C. § 2-713 provides in pertinent part:

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

4. U.C.C. § 2-610 provides in pertinent part: "When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may (a) for a commercially reasonable time await performance by the repudiating party . . . ."

with little difficulty if the buyer does cover.<sup>5</sup> The buyer who does not cover, however, is subjected to great uncertainty in damage measurement because of the clash between the "learned of the breach" language of section 2-713 and the "commercially reasonable time" policy of section 2-610. The buyer does not know if his damages will be measured in relation to market price at the time he became aware of the seller's intent not to perform, or if he can await performance and have damages measured by the market price at some later date. The puzzle is made even more complex by the difference in "learned of the breach" in section 2-713 and the use in section 2-723, which details the measure of damages in anticipatory repudiation cases coming to trial before time of performance, of the time the buyer "learned of the repudiation."<sup>6</sup>

In the recent case of *Cargill, Inc. v. Stafford*,<sup>7</sup> the United States Court of Appeals for the Tenth Circuit offered a new solution to the puzzle by holding that under section 2-713 a buyer may encourage the seller's performance for a reasonable time, but that at the end of that reasonable period he should cover if substitute goods are readily available. The court stated that if the buyer can readily cover and does not do so within a reasonable time, damages should be based on the market price of the goods at the end of the reasonable time rather than on the price when performance is due.<sup>8</sup> If, however, the buyer has a valid reason for not covering, damages should be calculated from the time when performance is due.<sup>9</sup>

The court's opportunity to address the problem presented itself in a case involving contracts for the sale of wheat. *Cargill*, the aggrieved buyer,<sup>10</sup> made two July telephone contracts with defendant-seller *Stafford*. On August 24, plaintiff received written notice that defendant, objecting to some provisions of the confirmations that plaintiff had mailed to him, considered the contracts void and refused to perform.<sup>11</sup> Plaintiff continued

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5. See note 2 *supra*.

6. U.C.C. § 2-723 provides in part:

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 and 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party *learned of the repudiation*.

*Id.* (emphasis added); see R. NORDSTROM, *supra* note 1, § 149, at 455-56; J. WHITE & R. SUMMERS, *supra* note 1, § 6-7, at 197-202.

7. 553 F.2d 1222 (10th Cir. 1977).

8. *Id.* at 1227. The seller will be most likely to repudiate in a rising market; therefore, the buyer's damages measured at this time will ordinarily result in lesser damages than those measured at a later time.

9. *Id.* Colorado law governed the case; Colorado has adopted without change the sections of the U.C.C. considered in the *Cargill* decision. See COLO. REV. STAT. §§ 4-2-610, -708, -713, -723 (1973).

10. Plaintiff is a cash merchandiser in agricultural commodities. 553 F.2d at 1223.

11. *Id.* at 1226.

to urge defendant to complete performance of the contract until there was a final rebuff from defendant on September 6. Plaintiff then notified defendant that the contracts were cancelled.<sup>12</sup>

In his suit for breach of contract,<sup>13</sup> plaintiff claimed that its damages should be measured either by the difference between the contract price and the market price on August 24, the date plaintiff received notice of defendant's definite repudiation of the contracts, or by the difference between the contract price and the market price on September 30, the date performance of the contract was due.<sup>14</sup> The district court measured the damages using September 6, the date of Stafford's final rebuff, as the date for determining the market-contract price differential.<sup>15</sup> The court of appeals, stating that the district court "gave no reason for its selection of the September 6 date,"<sup>16</sup> remanded the case to determine the correct date for measuring damages. In doing so, the Tenth Circuit indicated that September 6 would be the correct date only if Cargill did not have a valid reason for his failure or refusal to cover,<sup>17</sup> but that September 30, the date performance was due, would be the date from which to measure damages if Cargill had a valid reason for not covering.<sup>18</sup>

The court effectively interpreted the "learned of the breach" language of section 2-713<sup>19</sup> to mean the "time performance is due" since a buyer would normally have a valid reason for not covering.<sup>20</sup> The court looked to

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12. *Id.* at 1224.

13. Defendant had asserted that neither of the two contracts was enforceable under the Statute of Frauds because he had made timely objection to the written confirmation sent to him by the buyer. *Id.* at 1225. COLO. REV. STAT. § 4-2-201(2) (1973) states:

Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirement of subsection (1) of this section against such party unless written notice of objection to its contents is given within ten days after it is received.

Stafford's statutorily required written objection to the second contract, however, did not reach Cargill within the required 10 day period. 553 F.2d at 1225.

14. 553 F.2d at 1223.

15. *Id.* at 1225.

16. *Id.*

17. The court noted, "The record does not show that Cargill covered or attempted to cover. Nothing in the record shows the continued availability or nonavailability of substitute wheat." *Id.* at 1227.

18. *Id.*

19. See note 3 *supra*.

20. Courts have considered the validity of reasons for not covering when deciding whether a buyer should be awarded consequential damages under U.C.C. § 2-715, *quoted in* note 39 *infra*. These cases provide some examples of potentially valid excuses for not covering in determining when to measure damages under the *Cargill* test. See, e.g., *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972) (failure to cover by procuring substitute equipment excused when equipment for harvest not readily available and crop ready for harvest); *Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists*, 14 Cal. App. 3d 209, 92 Cal. Rptr. 111 (1971) (plaintiff unable to cover because substitute items unavailable at prices within his financial ability).

the use of "repudiation" in section 2-723<sup>21</sup> and reasoned that if the drafters of the Code had intended "learned of the breach" in section 2-713 to mean "learned of the repudiation," the word "repudiation" would have been used.<sup>22</sup> The court also relied heavily on the common law tradition interpreting "learned of the breach" to mean "time performance is due."<sup>23</sup> The court's emphasis on cover does not, however, arise from any common law tradition, but is instead an extension of the Code provisions concerning the subject.

At common law, damages traditionally were measured by calculating the difference between contract price and market price at the time performance was due.<sup>24</sup> Section 67(3) of the Uniform Sales Act, which codified the common law approach, adopted this same measure.<sup>25</sup> According to the *Restatement of Contracts*, "[T]he rules for determining the damages recoverable for an anticipatory breach are the same as in the case of a breach at the time fixed for performance."<sup>26</sup>

*Cargill* follows this pre-Code tradition in its determination that in cases of anticipatory repudiation by the seller the buyer's damages are to be measured by the contract-market price differential at the time performance was due. This formulation represents a definite break from other post-Code cases interpreting section 2-713, which generally have presumed that the buyer learned of the breach when he learned of the seller's repudiation.<sup>27</sup>

21. See note 6 *supra*.

22. 553 F.2d at 1226.

23. *Id.*

24. *Id.*; see, e.g., *McJunkin Corp. v. North Carolina Natural Gas Corp.*, 300 F.2d 794, 801 (4th Cir. 1961), *aff'd on rehearing*, 300 F.2d 794 (4th Cir.), *cert. denied*, 371 U.S. 830 (1962) (damages measured from the time performance due); *Reliance Cooperage Corp. v. Treat*, 195 F.2d 977, 982 (8th Cir. 1952) (reversing district court measurement of damages from the time of repudiation in an anticipatory repudiation case); *Continental Grain Co. v. Simpson Feed Co.*, 102 F. Supp. 354, 363 (E.D. Ark. 1951), *aff'd*, 199 F.2d 284, 286 (8th Cir. 1952) (damages are measured when performance is due; an aggrieved buyer "is not required to go upon the open market and purchase upon receipt of notice that the seller does not intend to perform"); Comment, *A Suggested Revision of the Contract Doctrine of Anticipatory Repudiation*, 64 YALE L.J. 85, 92 n.40, 95 n.54 (1954).

25. UNIFORM SALES ACT § 67(3) states:

Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

26. RESTATEMENT OF CONTRACTS § 338 (1932).

27. See *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977); *Maxwell v. Norwood Marine, Inc.*, 19 U.C.C. Rep. 829 (Mass. Dist. Ct. App. Div. 1976).

Many commentators have ignored or failed to recognize the inconsistencies inherent in § 2-713. See, e.g., Hey, *Remedies for Breach of Sales Contract Under the Code*, 7 WASHBURN L.J. 35 (1957); Small, *The Remedy Provisions of Article 2 of the Uniform Commercial Code: A Practical Orientation*, 4 GONZ. L. REV. 176 (1969).

Damages then were measured by calculating the difference between the contract price and the market price at the time of the seller's repudiation.<sup>28</sup> There is no suggestion in those cases that a damage calculation should be based on the time performance was due.

In its interpretation, the *Cargill* court depended chiefly upon White and Summers,<sup>29</sup> who strongly urge that "learned of the breach" in section 2-713 means "time performance is due" and conclude that the Code should not be interpreted in a manner that changes pre-Code law without a more definite statement that clearly indicates the change.<sup>30</sup> *Cargill's* utilization of the time performance was due as the time from which to measure damages was conditioned upon a finding that the aggrieved buyer had a valid reason for failing or refusing to cover.<sup>31</sup> Here the common law provided little guidance. Pre-Code decisions did not require or even encourage an aggrieved buyer to purchase substitute goods. If he chose, a buyer could cover and ordinarily recover the difference between the contract price and the substitute price if he used reasonable care in making his substitution.<sup>32</sup> If, however, the price the buyer paid for cover exceeded the court's determination of the market price at the time performance was due, the buyer had to absorb the additional loss.<sup>33</sup>

The Code statutorily recognizes and places new emphasis upon the concept of cover. Karl Llewellyn, chief reporter for the Code,<sup>34</sup> wanted to require cover whenever possible.<sup>35</sup> The Code itself, however, although

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28. In a case relied upon in *Cargill*, *Oloffson v. Coomer*, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973), cited at 553 F.2d at 1226, however, the court considered times other than repudiation for the purpose of measuring damages. Although the *Coomer* court calculated damages based on the time of repudiation, *id.* at 921, 296 N.E.2d at 873, it also took into account the commercially reasonable time requirement of § 2-610 in its decision that in this case damages measured from the time of repudiation also met the commercially reasonable time requirement. The *Coomer* court reasoned that because the seller's statement was an unequivocal repudiation and cover was easily obtained, it would have been unreasonable for the buyer to await performance. *Id.* at 922, 296 N.E.2d at 874. *Cargill* is consistent with *Coomer* in this respect, but goes beyond *Coomer* by suggesting a time from which to measure damages if the buyer has a valid excuse for not covering. 553 F.2d at 1227.

29. J. WHITE & R. SUMMERS, *supra* note 1, § 6-7, at 198-202.

30. *Id.* § 6-7, at 201-02.

31. 553 F.2d at 1227.

32. See, e.g., *Hosiery Co. v. Cotton Mills*, 140 N.C. 452, 53 S.E. 140 (1906).

33. See, e.g., *Missouri Furnace Co. v. Cochran*, 8 F. 463 (C.C.W.D. Pa. 1881).

34. The history of the Code is described in Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967). Llewellyn wrote of the "democratic process" that produced the Code "over a period of more than fifteen years, out of the labors of more than fifteen hundred skillful lawyers" in Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 374 (1957).

35. Llewellyn set forth his reasoning in REVISED UNIFORM SALES ACT § 58-A, Comment (Second Draft, 1941):

If there should be real desire to give effect to the principle frequently announced by the Courts, that "one party to a contract will not be allowed to speculate upon the

clearly favoring cover, does not expressly require that a buyer make a substitute purchase. Furthermore, none of the Code's scattered references and comments related to cover indicate that, in cases of anticipatory repudiation, the time from which damages are measured should be determined by reference to whether a buyer could have covered. Section 2-711, a catalogue of buyers' remedies, states that the buyer may cover or recover damages under 2-713.<sup>36</sup> Section 2-712, the primary Code provision concerning cover, states that a buyer "may" cover; the official comment to this section stresses that "the buyer is always free to choose between cover and damages for non-delivery."<sup>37</sup> The final comment to section 2-713 states, "[T]he present section provides a remedy which is *completely alternative* to cover . . . ."<sup>38</sup> The only indication in the Code that the buyer might suffer if he does not cover is section 2-715(2)'s assertion that consequential damages might be limited by a party's failure to cover.<sup>39</sup>

Although the Code does not expressly require cover, the combination and effects of available remedies may make the procurement of cover a practical necessity for the buyer, particularly if the buyer's damages are to be measured at the time of repudiation. Use of this time to measure damages gives the repudiating seller a commanding position because he can choose the time of repudiation and therefore dictate the time at which damages will be measured.<sup>40</sup> Typically, the buyer will cover and damages will be meas-

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other," the measure for the purpose would be a provision, in regard at least to anticipatory breach, whereby the party in breach could require the aggrieved party, by demand, to resort to cover or cancel without liability, within a reasonable time after such demand. Inability to effect cover after reasonable effort would of course not in any manner impair the common remedies of the aggrieved party.

36. U.C.C. § 2-711 provides in part:

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2-713).

37. *Id.* § 2-712, Comment 3.

38. *Id.* § 2-713, Comment 5 (emphasis added).

39. *Id.* § 2-715(2) provides in part: "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . . ."

40. See, e.g., Anderson, *Repudiation of a Contract Under the Uniform Commercial Code*, 14 DEPAUL L. REV. 1 (1964); Squillante, *Sales Law in Iowa Under the Uniform Commercial Code—Article 2*, 20 DRAKE L. REV. 1 (1970). Anderson's article, which presumes that the buyer's damages are to be measured at the time of repudiation, is the strongest statement of this position:

The new formula diminishes the value of [the buyer's] action for damages: he recovers the amount that the market price has increased between the date of the contract and

ured under section 2-712.<sup>41</sup> The buyer, however, cannot be certain how his damages will be measured if he does not cover.<sup>42</sup> There is very little case law in this area upon which the buyer can rely.<sup>43</sup> There is not even agreement about whether cover must be used as a measure of damages if it is obtained, or whether the buyer procuring cover retains an option to bring suit for damages.<sup>44</sup> Furthermore, commentators on the Code disagree about the propriety of a requirement of cover.<sup>45</sup>

*Cargill* clearly places cover in a critical position. In *Cargill*, the entire measure of damages hinges on whether a contract for substitute goods could have been made. Under the test suggested by the court, measurement of damages will vary widely, depending upon the acceptability of the buyer's excuse for not procuring cover.<sup>46</sup> If the buyer has no acceptable excuse, his damages are measured by the difference between the contract price and the market price at the end of a "reasonable time."<sup>47</sup> If measured at this time,

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the date of the repudiation, and an alert seller can make that difference small or nothing by repudiating immediately after a price rise appears to be likely. This deterioration to the point of worthlessness in the buyer's action for damages practically compels him to resort to the remedy of "cover."

Anderson, *supra* at 18-19.

41. See note 2 *supra*.

42. One commentator blames these uncertainties on the general attitude of the Code draftsmen towards damages, pointing out that the Code makes every effort to protect reasonable investments actually made in the market, but that "the Code shifts about, erratically and unpredictably, when damages are to be measured by a market to which the complainant has had no recourse. It is almost as if the draftsmen felt that such a remedy was in any case so undeserving that its precise statement became unimportant." Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 267 (1963).

43. *Oloffson v. Coomer*, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973), discussed in note 28 *supra*, is the only case (other than *Cargill*) that discusses at length an interpretation of § 2-713 in connection with anticipatory repudiation when the buyer does not cover. Other cases determining when damages should be measured under § 2-713 generally choose the time of the seller's repudiation without any detailed discussion. See *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 971 (4th Cir. 1977) (date of seller's repudiation presumed to be correct date for damage measurement); *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781, 800 (5th Cir. 1973) (comparison of § 2-713 with pre-Code Texas law stating damages measured at time and place of breach); *Maxwell v. Norwood Marine, Inc.*, 19 U.C.C. Rep. 829, 831 (Mass. Dist. Ct. App. Div. 1976) (damages refused to buyer because of no evidence on exact date he learned of seller's repudiation); *Sawyer Farmers Coop. Ass'n v. Linke*, 231 N.W.2d 791, 795 (N.D. 1975) (acceptance of repudiation not necessary to effectuate breach); *Tennell v. Esteve Cotton Co.*, 546 S.W.2d 346, 356 (Tex. Ct. App. 1976) (buyer learned of the breach when seller repudiated).

44. See *Maxwell v. Norwood Marine, Inc.*, 19 U.C.C. Rep. 829 (Mass. Dist. Ct. App. Div. 1976).

45. Compare 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.4403, at 249 (1964) and R. NORDSTROM, *supra* note 1, § 145, at 445 n.88 (Code does not require cover) with J. WHITE & R. SUMMERS, *supra* note 1, § 6-4, at 191 n.77 (practical necessity for cover under the Code).

46. 553 F.2d at 1227. The court does not discuss what an acceptable excuse would be. Earlier cases indicate that a wide variety of reasons are acceptable. See note 20 *supra*.

47. 553 F.2d at 1227. This presumably corresponds with § 2-610's "commercially reasonable time." See note 4 *supra*.



the damages would be likely to correspond closely with the damages assessed in cases in which the buyer does cover, because substitute goods must be procured within a commercially reasonable time. The buyer with an acceptable excuse for not covering would measure his damages in relation to the market price when performance was due. Any correspondence between this measure of damages and damages in cases in which the buyer does cover would be fortuitous.

The interpretation chosen by the *Cargill* court is not, however, the only alternative interpretation of section 2-713's language and the concept of cover. Nordstrom stresses a reconciliation of the Code sections concerning anticipatory repudiation and concludes that the aggrieved buyer's damages in such cases should be measured at a reasonable time after the repudiation.<sup>48</sup> This reasonable time, which takes section 2-610 into account,<sup>49</sup> would be such time after the repudiation as would allow the buyer to contract for substitute goods.<sup>50</sup> In a period of fluctuating market value, the buyer would not be at the mercy of a seller who could choose the time of repudiation. Nor would the buyer be able to speculate at the seller's expense by determining whether he could more profitably cover or collect damages, since the two figures would correspond closely.<sup>51</sup>

The choice between the various analyses of section 2-713 would be difficult even if only historical considerations and the "commercially reasonable time" requirement of section 2-610 were weighed in the balance. The language of section 2-723(1), however, requires that the time of the seller's repudiation be used to calculate damages in cases of anticipatory repudiation that come to trial before the time of performance.<sup>52</sup> This requirement provides a simple method for determining what the market price would be at the time of performance—a time that, in the situation addressed by section 2-723, would not yet have arrived. If one interprets "learned of the breach" in section 2-713 to mean the time of "repudiation" as used in section 2-723, however, the aggrieved buyer is foreclosed from awaiting the seller's performance for a "commercially reasonable time," a privilege the buyer has under section 2-610. Therefore, an analysis equating "learned of

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48. R. NORDSTROM, *supra* note 1, § 149, at 455.

49. See note 4 *supra*.

50. R. NORDSTROM, *supra* note 1, § 149, at 455. White and Summers reject this explanation as doing more violence to the language of § 2-713 than their conclusion. J. WHITE & R. SUMMERS, *supra* note 1, § 6-7, at 201 n.108; see Leibson, *Anticipatory Repudiation and Buyer's Damages—A Look Into How the U.C.C. Has Changed the Common Law*, 7 UNIFORM COM. CODE L.J. 272 (1975).

51. See note 55 *infra*.

52. See note 6 *supra*.

the breach" with "time of repudiation" in section 2-723 merely shifts the focus of the inconsistencies.<sup>53</sup>

The Code's internal inconsistencies,<sup>54</sup> the lack of a strong interpretive trend in court decisions, and disagreement among major Code commentators all make it difficult to determine a buyer's damages in cases of anticipatory repudiation. The strength of the *Cargill* court's conclusion depends upon the interpretation of the purpose of section 2-713. If the section is viewed as blending with and supporting the other sections of the Code concerning anticipatory repudiation, the "time the buyer learned of the breach" should correspond closely with the time required for procuring cover.<sup>55</sup> If, however, the relationship between section 2-713 and the other Code sections is not considered paramount, the pre-Code formula equating "time the buyer learned of the breach" with "time performance is due" is more logical.<sup>56</sup> The Tenth Circuit believed that the section was not meant to change the common law and its statutory statement in section 67(3) of the Uniform Sales Act<sup>57</sup> and accordingly tied its conclusion to pre-Code considerations,<sup>58</sup> rejecting the rather weak trend of post-Code cases of deter-

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53. The *Cargill* court believed that the use of "repudiation" in § 2-723 and "learned of the breach" in § 2-713 indicated that the two expressions referred to two different times. 553 F.2d at 1226. Most commentators, however, begin with the presumption that the "breach" of § 2-713 refers to the same time as the "repudiation" of § 2-723 and then try to reconcile the two. See R. NORDSTROM, *supra* note 1, § 149, at 455 (since § 2-723 measures damages from time of repudiation when case comes to trial before performance is due, "time of performance" would be used when the case comes to trial after performance is due); J. WHITE & R. SUMMERS, *supra* note 1, § 6-7, at 199 (cautions against overstressing the importance of § 2-723); Peters, *supra* note 42, at 265 (§ 2-723 relates only to evidentiary difficulties); Comment, *supra* note 24, at 104 (poses interpretation of § 2-723 that would make the section repugnant to basing damages for anticipatory repudiation on a time other than when performance is due). Section 2-610 must weigh more heavily in the balance, however, in interpreting § 2-713 than does § 2-723. R. NORDSTROM, *supra* § 149, at 455; Liebson, *supra* note 50, at 281; Comment, *supra* at 104.

54. The harshest indictment of the inconsistency of Code language is found in Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185 (1967). This article, however, does not specifically address § 2-713 problems.

55. Presumably the damages figures would closely correspond because the calculations of the contract-market price differential would use approximately the same time period in measuring damages. Thus, if the buyer covers (something he must do without unreasonable delay), the cover price will be used in determining damages. If, however, the buyer does not cover, the price at the time he should have covered (at the end of a reasonable time after learning of repudiation) will be used.

56. If Code considerations were put aside, the reasons for following common law tradition would be even stronger as both a desire for consistency in measurement and the strength of the long tradition would point towards continuing the common law interpretation.

57. See note 25 *supra*.

58. Various authorities have put forth theories about the purpose of § 2-713 that offer a wide range of interpretive possibilities. Peters suggests in her article that it could be interpreted as a statutory liquidated damages clause. Peters, *supra* note 42, at 259. One commentator suggests that § 2-713 was not intended by the draftsmen to apply to situations of anticipatory breach, but "was drafted to meet those instances where the buyer does not learn of the breach until after the date of performance." Comment, *supra* note 24, at 103. White and Summers

mining anticipatory repudiation damages in relation to the contract-market differences at the time of the seller's repudiation.<sup>59</sup>

The *Cargill* decision accomplishes two things. At the very least, it analyzes carefully the phrase "learned of the breach" as it relates to the concept of cover. This fact in itself would separate the case from other decisions that ordinarily *presume* that "learned of the breach" means time of repudiation.<sup>60</sup> The decision should also clearly illustrate to the Permanent Editorial Board of the Uniform Commercial Code<sup>61</sup> that the problems long discussed by Code commentators are now resulting in widely divergent judicial opinions.<sup>62</sup> The Code itself was drafted in order to establish simplicity, clarity and uniformity of law.<sup>63</sup> These goals are not being realized in those cases when sellers repudiate before time of performance has arrived and the buyer does not cover. *Cargill* is an attempt at clarification, but no court can reconcile the language of section 2-713 and the sections that specifically discuss anticipatory repudiation until the purpose of section 2-713 is further explained.

The *Cargill* decision adds to the uncertainty by making an acceptable excuse for not covering the determinant in setting the time from which to measure damages.<sup>64</sup> The buyer must be concerned not only with when his damages will be measured under the *Cargill* formula, but also with what will be considered a valid reason for not covering. The only reasonable escape for the buyer from this maze of uncertainties is to cover and have damages measured according to section 2-712.<sup>65</sup> For the buyer who does not

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agree with this theory, adding that perhaps it is to induce the buyer to cover. J. WHITE & R. SUMMERS, *supra* note 1, § 6-7, at 199, 205. Nordstrom is less kind to the draftsmen, stating that "it looks as if the problem of measuring damages following a repudiation was either not considered by the drafters or was considered on different occasions and resolved differently each time it was considered." R. NORDSTROM, *supra* note 1, § 149, at 455-56.

59. 553 F.2d at 1226.

60. *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977); *Maxwell v. Norwood Marine, Inc.*, 19 U.C.C. Rep. 829 (Mass. Dist. Ct. App. Div. 1976).

61. 1961 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTIETH YEAR 166 indicates the board is to consider proposed amendments when "(a) It has been shown by experience under the Code that a particular provision is unworkable or for any other reason obviously requires amendment; or (b) Court decisions have rendered the correct interpretation of a provision of the Code doubtful and an amendment can clear up the doubt . . ."

62. *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977), which calculated damages in an anticipatory breach case from the date of repudiation, was decided only a few months before *Cargill*. It represents the opposite extreme (from time performance was due) in setting the time for measuring damages.

63. See U.C.C. § 1-102.

64. See text accompanying notes 17-18 *supra*.

65. The buyer, of course, could escape the maze by circumventing it completely. Detailed drafting of the contract could include a provision stating when the market price is to be determined in a situation of anticipatory breach by the seller in which the buyer does not cover. U.C.C. § 1-102(3) provides that the provisions of the Code may be "varied by agreement."

cover, however, a more faithful interpretation of the language of the Code would keep cover as a choice, not as an integral determinant of damage measurement.

Pre-Code law favored a method for calculating damages that could be applied in all cases.<sup>66</sup> Perhaps this policy of uniformity should also help determine the direction of post-Code decisions. An interpretation of section 2-713's "learned of the breach" to mean that an aggrieved buyer who does not cover would also "learn" of the breach at the end of the same time period he would have had to procure cover would serve a dual purpose. It would reconcile section 2-713 with the basic policy of allowing a buyer a "commercially reasonable time" before taking any action and, in contrast to *Cargill*, would be more likely to yield the same amount in damages as when the buyer covered. In this way, the courts would be upholding an important traditional purpose of damage measurements while resting their decisions on Code considerations and policies.

CARLYN GRAU POOLE

### **Criminal Law—Polygraph Examination Results Admissible in Post-Conviction Hearings**

Despite the widespread use of and reliance upon the polygraph or "lie detector"<sup>1</sup> in nonjudicial and pretrial investigations,<sup>2</sup> courts have regarded the polygraph with suspicion. Polygraph examination results have been barred from most courts in the United States<sup>3</sup> on the ground that such

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66. See text accompanying notes 24-26 *supra*.

1. The polygraph, commonly called a "lie detector," is designed to monitor and measure certain physiological responses of a person who is answering a set of "yes" or "no" questions. The device consists of three basic parts: (1) a "pneumograph tube" which is fastened around the subject's chest to record respiration; (2) a blood pressure cuff to record pulse and blood pressure; and (3) electrodes fastened to the hands or fingers through which an imperceptible electric current passes in order to record galvanic skin response. The instrument produces an electromechanical recording of unconscious physiological changes theoretically produced by internal stress caused by an examinee's conscious insincerity. The polygraph examiner's expert opinion regarding his examinee's sincerity is based on his analysis of the recording and other circumstances of the examination. See generally 3A WIGMORE ON EVIDENCE § 999 (J. Chadbourn rev. 1970 & Supps. 1975 & 1977).

2. See, e.g., *People v. Reagan*, 395 Mich. 306, 313, 235 N.W.2d 581, 584-85 (1975) (Michigan Supreme Court took judicial notice of investigative usefulness of polygraph).

3. E.g., *Marks v. United States*, 260 F.2d 377 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); *People v. York*, 174 Cal. App. 2d 305, 344 P.2d 811 (1959). But see *United States v.*